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Robert J. Desiderio

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has assumed the risk of possible harmful effects from their use and should be subject to this defense in an action of implied warranty.

JAMES JEROME COOGAN

Secured Transactions—After Acquired Property Clause—Priority to "Equipment Under the Uniform Commercial Code."—*United States v. Baptist Golden Age Home*.¹—This was a foreclosure action by the United States, brought for the use and benefit of the Federal Housing Commission, against the defendant Baptist Golden Age Home. On August 18, 1960, Baptist executed and delivered to T. J. Bettes Company an installment promissory note and deed of trust on its real property. The deed of trust and note, which were set out in the court's opinion,² contained an after-acquired property clause which encumbered:

[A]ll fixtures, including but not limited to all . . . furniture . . . and other furnishings; and

All articles of personal property . . . now or hereafter attached to or used in and about the building. . . .

These instruments were recorded in the office of the county recorder of deeds on August 19, 1960. Subsequently, Baptist defaulted and the entire indebtedness became due. On February 12, 1963, the Federal Housing Commission (hereinafter the United States) received by way of assignment all interest in the deed of trust and note. The United States recorded this assignment in the office of the county recorder of deeds and then commenced proceedings against Baptist to foreclose the security interest. At the foreclosure proceedings, Hilton Furniture Company intervened, alleging that it had sold Baptist certain furniture, furnishings and carpeting under a conditional sales contract dated June 18, 1962, and that the entire amount of the contract price remained unpaid. Hilton further claimed that the United States acquired no interest in this property since Hilton retained title to the goods under the conditional sales contract, and that its interest in the chattels was thus superior to that of the United States. Hilton, however, never recorded this conditional sales contract. HELD: The United States' interest in the furniture, furnishings and carpeting created by the prior deed of trust containing the after-acquired property clause was superior to Hilton's interest under Sections 9-301 and 9-312(4) of the Uniform Commercial Code.³ The court reasoned that Hilton was not entitled to priority because it had not perfected its interest⁴ in the collateral⁵ by filing under Sections 9-312(4)

¹ 226 F. Supp. 892 (W.D. Ark. 1964).

² Id. at 896.

³ The sections of the Arkansas Uniform Commercial Code utilized are unchanged from the official text of the Uniform Commercial Code and will be cited as "UCC § —."

⁴ The court relied on UCC § 9-102, and held Hilton's retention of title was only the reservation of a "security interest." *United States v. Baptist*, supra note 1, at 898-99.

⁵ The court found the furniture, furnishings and carpeting were "equipment" under UCC § 9-109(2) and thus filing was required. *United States v. Baptist*, supra note 1, at 900.

and 9-401 (third alternative subsection [1]) of the Uniform Commercial Code.

The court first concluded that the United States' security interest was perfected in 1960 when the deed of trust containing the after-acquired property clause was first recorded by its assignor. Secondly, it concluded that the United States obtained priority over Hilton's security interest in 1962,⁶ as a result of Hilton's failure to perfect its purchase money security interest at the time Baptist received possession or ten days thereafter.⁷ Thus, the court used pre-Code law to determine perfection and the Code to determine priority.

It is submitted, however, that the Code should also have been determinative of whether the United States had a perfected security interest.

It is clear that transactions completed before the Code remain valid and must be enforced after the Code by pre-Code law.⁸ This, however, was not the situation in the present case. When Hilton and Baptist executed the conditional sales contract with respect to the furniture, furnishings and carpeting in June, 1962, they entered into a transaction controlled by the Code.⁹ The United States' security interest in this property therefore attached after the effective date of the Code, even though the means of attachment, the after-acquired property clause, was brought about prior to this date.¹⁰ There was a potential security interest before the introduction of the Code, which came into existence after the commencement of the Code.

Moreover, it is contended the United States' superior claim to the collateral was due solely to the fact that the conditional sales contract was executed after the effective date of the Code. It would thus follow that if the agreement between Hilton and Baptist occurred prior to the effective date of the Code, Hilton would have had an unassailable right to the property. Generally, under a conditional sales contract the title to the goods is retained by the seller¹¹ while the buyer acquires a mortgagable interest.¹² In the instant case this would mean that Hilton had title to the furniture,

⁶ This was six months after the effective date of the Code. The 63rd General Assembly of Arkansas, by Act 185 of 1961, adopted the Uniform Commercial Code. The Uniform Commercial Code, Title 85 of the Arkansas Statutes, became effective at midnight on December 31, 1961.

⁷ UCC § 9-312(4):

A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.

⁸ U.S. Const. Art. 1, § 10 provides:

No State shall . . . make any . . . law impairing the Obligations of Contracts. . . .

See *First Nat'l Bank v. Bahaan*, 26 Ohio C.P. 2d 429, 198 N.E.2d 272 (1964); compare UCC § 10-102 (not adopted in Arkansas); see also *Roller v. Jaffee*, 387 Pa. 501, 128 A.2d 355 (1957).

⁹ UCC § 9-102.

¹⁰ See *Hill v. Morris*, 124 Ark. 132, 186 S.W. 609 (1916), which held, the lien derived from an after-acquired property clause becomes effective when the property in question merges with the original collateral.

¹¹ *Burroughs Adding Mach. Co. v. Wieselberg*, 230 Mich. 15, 203 N.W. 160 (1925).

¹² *Clinton v. Ross*, 108 Ark. 442, 159 S.W. 1103 (1912).

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furnishings and carpeting whereas Baptist merely had a mortgagable interest. A mortgage of the property under pre-Code law would not have prejudiced Hilton's right to enforce its title and recover the property.¹³ Under the Code, however, a mortgage lien could be superior to Hilton's purchase money security interest whether or not Hilton had retained title to the property.¹⁴ Therefore, since the United States' interest attached after the effective date of the Code when the conditional sales contract was executed and since any priority of the United States depended upon the existence of the Code at the date of attachment, the Code should have been employed to determine both the priority and perfection of the United States' security interest.

The major objection to this position appears to involve a constitutional question.¹⁵ The argument is that if the United States were compelled to file as required by the Code, its pre-Code contract rights would have been impaired, violating Article 1, Section 10 of the Constitution.¹⁶ This issue is clearly discussed in *First Nat'l Bank v. Bahan*¹⁷ where the Ohio Court of Common Pleas held the Uniform Commercial Code would have been unconstitutional if it advanced a lien for repairs of a tractor ahead of liens of chattel mortgages properly filed before the repairs were made and before the effective date of the Code.

However, the United States' contract rights would not have been altered because the Code had been employed. It would have had the same interest in the real estate¹⁸ and pre-Code personal property,¹⁹ and it would have acquired the same security interest in the furniture, furnishings and carpeting.²⁰ There could not have been any violation of a right that did not exist.²¹ The United States' security interest in the collateral had not attached until June 18, 1962, six months after the effective date of the Code.²² This is in contrast with the mortgagees in the *Bahan* case whose rights to the tractor were vested prior to the effective date of the Code.

Having concluded that the court should have applied the Code in determining whether the United States had a perfected security interest, it must now be determined what effect this would have had on the parties' security interests.

The first effect would have been that the United States would not have had a perfected security interest. It will be recalled that the United States had recorded the assignment of the deed of trust in the office of the county recorder of deeds. This recording, however, would not have been effective to perfect its security interest under the Code, because the furniture,

¹³ *Ibid.* Official Comment 3, UCC § 9-312.

¹⁴ UCC § 9-202; *Cain v. Country Club Delicatessen*, 25 Conn. Supp. 327, 203 A.2d 441 (1964).

¹⁵ See *First Nat'l Bank v. Bahan*, *supra* note 8.

¹⁶ U.S. Const. Art. 1, § 10, *supra* note 8; *First Nat'l Bank v. Bahan*, *supra* note 8.

¹⁷ *First Nat'l Bank v. Bahan*, *supra* note 8.

¹⁸ UCC § 9-104(j).

¹⁹ U.S. Const. Art. 1, § 10, *supra* note 8.

²⁰ UCC § 9-204(3).

²¹ See *Dunham Lumber Co. v. Gresz*, 71 N.D. 491, 2 N.W.2d 175 (1942).

²² See *Hill v. Morris*, *supra* note 10; see also UCC § 9-204(1).

furnishings and carpeting were held to be equipment within the meaning of the Code.²³ The United States would therefore have been required to file its security interest in the office of the Secretary of State in addition to the office of the county where Baptist had its place of business.²⁴

By this reasoning, each party then would have had an unperfected security interest in the collateral. Priority between such conflicting unperfected security interests in the same collateral is determined, under Section 9-312(5)(c) of the Code, in the order of attachment of the respective interests. Hilton's interest attached when the conditional sales contract was executed.²⁵ The United States' interest attached afterwards when the goods were delivered to Baptist, because under the after-acquired property clause all goods were encumbered when "they were attached to or used in and about the building."²⁶ As a direct consequence of a decision that the United States had an unperfected security interest, it therefore follows that Hilton should have had the prior claim to the furniture and furnishings, and possibly even to the carpeting.²⁷

As to the carpeting, it seems that the Code would not have had any effect on the United States' claim to it. Besides holding that the furniture, furnishings and carpeting were equipment, the court also decided that "carpeting could be construed as a fixture."²⁸ Section 9-401(2) of the Code states:

²³ See note 5 supra.

²⁴ UCC § 9-401(1)(c) (Arkansas adopted Third Alternative Subsection [1]).

²⁵ UCC § 9-204(1) states:

A security interest cannot attach until there is agreement . . . that it attach and value is given and *the debtor has rights in the collateral*. (Emphasis supplied.)

²⁶ United States v. Baptist Golden Age Home, supra note 1, at 896.

UCC § 9-204(1) would not apply since the after-acquired property clause specifically indicated when goods were to be attached.

If UCC § 204(1) did apply, both parties would qualify under UCC § 9-312(5). The court could then have gone outside the Code and used case law to resolve the conflict. UCC § 1-103. In such a situation, Hilton would have prevailed since it retained title to the collateral. Cases cited note 13 supra. The court could also have treated the interests equally giving each a pro rata share. Cf. Hogan, Financing the Acquisition of New Goods Under the UCC, 3 B.C. Ind. & Com. L. Rev. 115, 130, 131 (1961).

²⁷ It can be further argued that giving Hilton the superior claim where both parties have unperfected security interests is the more equitable result. As a practical matter the original mortgage was granted with the real estate as the sole collateral, and the after-acquired property was merely "frosting on the cake." It thus follows that Hilton who in good faith entered into the conditional sale should be deemed to have a senior lien on the goods. To hold otherwise would mean that a seller of equipment would have to ask every customer whether there were any prior liens that could attach to the property.

²⁸ United States v. Baptist Golden Age Home, supra note 1, at 903; see Coogan, Security Interests in Fixtures under the Uniform Commercial Code, 75 Harv. L. Rev. 1319 (1962).

It is arguable that characterizing carpeting as a fixture gave the United States a superior interest to the furniture, furnishings and carpeting. Mentioning the furniture and furnishings, as well as the carpeting, in the mortgage instrument could have placed everyone on notice that the lien also secured these articles. UCC § 9-401(2) provides in part:

A filing . . . also effective with regard to collateral covered by the financing

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A filing . . . in an improper place or not in all the places required . . . is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article. . . .

The proper place to file a security interest in a fixture is in the local office of the recorder of deeds.²⁹

ROBERT J. DESIDERIO

Taxation—Section 223 of the 1964 Revenue Act—Remittance in Response to "Asserted Liability"—Interest Deductibility in Year of Transfer.—*Charles Leich and Co. v. United States*.¹—This is a motion for rehearing and amendment of a judgment on the ground that the judgment was inconsistent with Section 223 of the Revenue Act of 1964.² Events leading up to the present litigation began in 1949 when the taxpayer claimed a refund for overpayment of an excess profits tax for the taxable year 1942. The alleged overpayment was made in response to a deficiency assessment. Refund was refused and while this litigation was pending the tax authorities notified Leich and Company by letter that an agent's report had been filed indicating another excess profits tax deficiency for the years 1943-1949. Taxpayer sent a letter of protest but was informed by the Internal Revenue Service that consideration of its protest would be postponed, pending the outcome of the litigation between taxpayer and the Government relating to 1942. The Service warned that the issues of the 1942 litigation were the same as those in 1943-1949, and thus the latter would be controlled by the doctrine of collateral estoppel. The trial court deciding the 1942 case ruled against the taxpayer in 1952. While the appeal period ran and while motions were pending, Leich and Company remitted to the Internal Revenue Service the sums, plus interest, totalling the amounts purported to be the 1943-1949 deficiencies. The 1952 decision respecting the 1942 deficiency was reversed on appeal. Taxpayer then brought action for refund of the remittances he had made for the 1943-1949 deficiencies. In this action taxpayer also sought the allowance of an interest deduction for the tax years 1952 and 1953.

statement against any person who has *knowledge* of the contents of such financing statement. (Emphasis supplied.)

²⁹ UCC § 9-401(1)(b).

¹ *Charles Leich and Co. v. United States*, 333 F.2d 871 (Ct. Cl. 1964).

² Section 223 of the Revenue Act of 1964 will be known as § 461(f) of the Internal Revenue Code of 1954. In the Senate Report and in the Senate Supplemental Report, this section is referred to as § 224. It is set forth as follows:

Contested Liabilities—If—(1) the taxpayer contests an asserted liability, (2) the taxpayer transfers money or other property to provide for satisfaction of the asserted liability, (3) the contest with respect to the asserted liability exists after the time of transfer, and (4) but for the fact that the asserted liability is contested, a deduction would be allowed for the taxable year of the transfer (or for an earlier taxable year), then the deduction shall be allowed for the taxable year of the transfer. This subsection shall not apply in respect of the deduction for income, war profits, and excess profits taxes imposed by the authority of any foreign country or possession of the United States.